Arab-Malaysian Finance Bhd v Hasliza bte Hasan

HIGH COURT (TEMERLOH) — CIVIL APPEAL NO 11–45 OF 2000
RAMLY ALI JC
5 APRIL 2001

Hire Purchase *— Breach of agreement — Action to recover unpaid instalments — Repossession not practically possible — Whether repossession of hired vehicle was sine quo non for plaintiff to file suit against defendant to recover moneys due under agreement*

The plaintiff had sued the defendant to recover moneys due under a hire purchase agreement. Paragraph 9 of the statement of claim stated that in spite of 39 attempts made by the plaintiff, the vehicle in question could not be repossessed as it could not be tracked down due to it not being kept at the address it ought to have been kept under the terms of the hire purchase agreement. The plaintiff's application for judgment in default of appearance against the defendant was dismissed by the magistrate who proceeded to strike out the plaintiff's claim on the ground that the plaintiff had not taken repossession of the hired goods before filing its claim, on the authority of *Arab-Malaysian Finance Bhd v Suhaimi bin AW Mohamed* [2001] 1 MLJ 149 ('*Suhaimi*'s case'). The plaintiff appealed.

Held, allowing the appeal:

(1) The judge in *Suhaimi's* case found that the summons were rightly struck out as the statement of claim did not contain statement relating to whether the vehicle in question had been repossessed or not, including the date of repossession. The issue of actual repossession of the vehicle was not the judge's reason for upholding the striking out of the summons. In the premises, the judge's observation on repossession was merely obiter in that case (see p 59F–G).

(2) Whether the vehicle was actually repossessed or not, the fact must be so stated in the statement of claim. In the present case, all the relevant particulars as laid down in *Suhaimi's* case had been fulfilled and sufficiently pleaded in the statement of claim (see p 59C, G).

(3) The repossession of the hired vehicle was not a *sine quo non* for the plaintiff to file his suit against the defendant to recover moneys due under the hire purchase agreement. The plaintiff had also clearly pleaded that they had attempted to repossess the hired vehicle but the vehicle could not be found and as such repossession was genuinely not possible. Section 42 of the Hire Purchase Act 1967 ('the Act') was not applicable to the plaintiff as the plaintiff had no information that the hired vehicle was still 'in the possession of the hirer' or any other identified person (see p 64B–C).

(4) An owner could still sue the hirer for money due under the hire purchase agreement if repossession is not practically possible. It is misconceived to say that the owner could not sue the hirer unless he had taken posession of the vehicle first. In fact s 20 of the Act makes it very clear that the owner may sue for money due under the hire purchase agreement and if upon obtaining a judgment thereon, the court may vary that judgment if the vehicle was subsequently repossessed and sold (see pp 60I–61A, D–E).

(5) It would be contrary to public policy if a defendant in a hire purchase action could come before a court of law to plead a defence that notwithstanding that he had not paid his hire purchase instalments and notwithstanding that he had not returned the hired goods to the plaintiff (owner) although being served with a notice of termination of the hire purchase agreement and/or a Fourth Schedule Notice (for repossession) under the Act, he could not be sued as the plaintiff had not succeeded in repossesing the hired goods (see p 62F–G).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan untuk mendapat semula wang yang perlu dibayar di bawah satu perjanjian sewa beli. Perenggan 9 kepada pernyataan tuntutan menyatakan bahawa meskipun 39 cubaan telah dibuat oleh plaintif, kenderaan yang dipersoalkan tidak boleh dimiliki semula kerana ia tidak dapat dijejaki memandangkan ia tidak disimpan di alamat yang sepatutnya ia disimpan di bawah terma-terma perjanjian sewa beli tersebut. Permohonan plaintif untuk penghakiman ingkar terhadap defendan telah ditolak oleh majistret yang telah seterusnya membatalkan tuntutan plaintif atas alasan bahawa plaintif tidak mengambil pemilikan semula barang-barang yang disewa tersebut sebelum memfailkan tuntutannya, berdasarkan autoriti *Arab-Malaysian Finance Bhd v Suhaimi bin AW Mohamed* [2001] 1 MLJ 149 ('kes *Suhaimi*'). Plaintif telah merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Dalam kes *Suhaimi*, hakim mendapati bahawa saman-saman tersebut telah dibatalkan dengan betul kerana pernyataan tuntutan tersebut tidak mengandungi kenyataan berhubung dengan sama ada kenderaan yang dipersoalkan telah dimiliki semula atau tidak, termasuklah tarikh pemilikan semula tersebut. Persoalan tentang pemilikan semula sebenar kenderaan tersebut bukan merupakan sebab hakim mengesahkan pembatalan saman tersebut. Dengan ini, pemerhatian hakim tentang pemilikan semula hanyalah obiter dalam kes tersebut (lihat ms 59F–G).

(2) Fakta sama ada kenderaan tersebut sebenarnya dimiliki semula atau tidak mestilah dinyatakan di dalam pernyataan tuntutan. Di

dalam kes ini, semua butir-butir yang relevan seperti mana yang dikemukakan dalam kes *Suhaimi* telah pun dipenuhi dan dipohon secukupnya di dalam pernyataan tuntutan (lihat ms 59C, G).

(3) Pemilikan semula kenderaan yang disewa bukan satu *sine quo non* untuk plaintif memfailkan guaman beliau terhadap defendan untuk mendapat semula wang yang perlu dibayar di bawah perjanjian sewa beli tersebut. Plaintif juga dengan jelas memohon bahawa mereka telah cuba memperolehi milikan semula kenderaan yang disewa tersebut tetapi kenderaan tersebut tidak dapat ditemui dan oleh itu pemilikan semula benar-benar tidak mungkin berlaku. Seksyen 42 Akta Sewa Beli 1967 ('Akta tersebut') tidak terpakai kepada plaintif kerana plaintif tiada maklumat bahawa kenderaan yang disewa tersebut masih 'di dalam pemilikan penyewa' atau mana-mana orang yang dikenalpasti (lihat ms 64B–C).

(4) Seorang pemilik masih boleh menyaman penyewa untuk wang yang perlu dibayar di bawah perjanjian sewa beli tersebut jika pemilikan semula boleh dikatakan tidak mungkin berlaku. Adalah salah tanggapan untuk mengatakan bahawa pemilik tidak boleh menyaman penyewa kecuali beliau telah mengambil pemilikan kenderaan tersebut terlebih dahulu. Lagipun s 20 Akta tersebut dengan jelas menyatakan bahawa pemilik boleh menyaman untuk wang yang perlu dibayar di bawah perjanjian sewa beli tersebut dan jika setelah memperoleh penghakiman berhubungnya, mahkamah boleh mengubah penghakiman tersebut jika kenderaan tersebut telah berikutannya dimiliki semula dan dijual (lihat ms 60I–61A, D–E).

(5) Adalah bertentangan dengan polisi awam jika seseorang defendan di dalam tindakan sewa beli boleh hadir ke mahkamah undang-undang untuk membawa satu pembelaan walaupun beliau tidak membayar ansuran sewa beli beliau dan meskipun beliau tidak mengembalikan barang yang disewa kepada plaintif (pemilik) sungguhpun telah disampaikan dengan satu notis penamatan perjanjian sewa beli dan/atau satu Notis Jadual Keempat (untuk pemilikan semula) di bawah Akta tersebut, dan beliau tidak boleh disaman kerana plaintif tidak berjaya untuk memiliki semula barang yang disewa tersebut (lihat ms 62F–G).]

Notes

For cases on action to recover unpaid instalments, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3402–3403.

Cases referred to

Arab Malaysian Finance Bhd v Suhaimi bin AW Mohamed [2001] 1 MLJ 149 (folld)

A *Butterworth Used Cars Sdn Bhd v Mayban Finance* [1991] 3 CLJ 1721 (refd)
Ooi Yoke In & Anor v Public Finance Bhd [1993] 2 CLJ 464 (refd)

Legislation referred to

B Hire Purchase Act 1967 ss 15, 16(1), (3), 16A, 18, 20, 38, 42, 43
Hire Purchase (Recovery of Possession and Maintenance of Records by Owner) Regulations 1976 reg 3

Francis JL Tan (*Rosni, Francis Tan & Ho*) for the appellant.
The respondent was absent/not represented.

C **Ramly Ali JC:.** This is an appeal by the appellant ('the plaintiff') against the decision of the learned magistrate of Temerloh made on 29 August 2000 whereby the learned magistrate had dismissed the oral application of the plaintiff for judgement in default of appearance against the respondent ('the defendant'); and ordered that the plantiff's action be dismissed. In this D case, the plantiff had sued the defendant to recover monies due under a hire purchase agreement dated 9 August 1997 entered into between the plaintiff (as owner) and the defendant (as hirer).

The summons and statement of claim were duly served on the defendant by way of an AR registered letter on 18 July 2000. The defendant E did not enter appearance nor file his defence. On the return date of the summons, ie on 29 August 2000, the defendant failed to appear to answer the summons. The plaintiff's counsel then, orally, asked for a judgement in default of appearance be entered against the defendant. The learned magistrate refused to grant the request and proceeded to strike out the plaintiff's claim. It is apparent from the learned magistrate's grounds of F decision that he had held that a hire purchase owner must repossess the hired goods first before he can sue to recover moneys due under a hire purchase agreement. The learned magistrate ordered the plaintiff's claim be dismissed on the ground the plantiff had not taken repossession of the hired goods before filing it's claim against the defendant.

G *The plaintiff's statement of claim*

The plaintiff's claim was based on a hire purchase agreement governed by the Hire Purchase Act 1967 ('the Act'). The statement of claim reads:

1 Plaintif adalah sebuah syarikat kewangan berlesen yang ditubuhkan di H Malaysia dan mempunyai pejabat berdaftarnya di Tingkat 22, Bangunan Arab-Malaysian Finance, No 55, Jalan Raja Chulan, 50200 Kuala Lumpur.

2 Alamat untuk penyampaian bagi defendan ialah No 402, Lorong Semantan 25 Taman Sri Semantan, 28000 Temerloh, Pahang Darul Makmur.

I 3 Melalui satu perjanjian sewa beli secara bertulis No 052-401-0019615-6 bertarikh 9 Ogos 1997 ('perjanjian tersebut') plaintiff telah menyewa-beli kepada defendan satu unit kenderaan PROTON SAGA 1.3S dengan

nombor pendaftaran JCC 5453 No Chasis C21ASNC233751 dan No Injin 4G13PAK3257 ('kenderaan tersebut') dengan jumlah harga Sewa Beli sebanyak RM43,790 yang kena dibayar secara 72 ansuran bulanan sebanyak RM609 tiap satu bermula dari 9 September 1997 dan ansuran terakhir sebanyak RM551 ('pembayaran secara ansuran tersebut'). Jumlah sewa beli sebanyak RM43,790 yang kena dibayar telah ditolak dari wang pendahuluan sebanyak RM9,700 yang telah dibayar oleh defendan.

4 Di bawah perjanjian tersebut, defendan, inter alia, bersetuju:

4.1 Untuk pembayaran kepada plaintif:

(i) Faedah lewat bayar pada kadar 8% setahun berdasarkan kiraan harian dikenakan ke atas mana-mana ansuran yang tidak dijelaskan mengikut jadual pembayaran;

(ii) Kos guaman yang berhubung dengan perlaksanaan perjanjian tersebut

4.2 Bahawa sekiranya defendan mengingkari pembayaran secara ansuran tersebut maka plaintif boleh, secara memberi notis bertulis kepada defendan dengan menghantar atau meletak notis tersebut ke atau di alamat defendan terakhir yang diketahui oleh plaintif, untuk menamatkan perjanjian tersebut dan penyewaan tersebut dan menuntut terhadap defendan keseluruhan baki jumlah harga sewa beli tersebut.

5 Defendan telah gagal untuk membayar ansuran tersebut dan tunggakan ansuran yang masih terhutang berjumlah RM2,763.80 (termasuk faedah dan kos-kos yang telah dikira setakat 15 April 2000).

6 Walaupun plaintif melalui peguam mereka Tetuan Rosni, Francis Tan & Ho, telah memberi notis kepada defendan bertarikh 17 April 2000 supaya menjelaskan pembayaran tunggakan ansuran sebanyak RM2,763.80 tersebut tetapi defendan telah enggan/gagal untuk menjelaskan.

7 Atas kegagalan defendan untuk menjelaskan wang tersebut maka melalui notis yang sama juga plaintif telah menamatkan penyewaan tesebut dan perjajian tersebut dan menuntut defendan gantirugi tertentu yang telah dipersetujui sebanyak RM22,676.07 tersebut, tetapi defendan telah enggan/gagal untuk menjelaskannya.

8 Pada masa yang sama dan menurut s 16 Akta Sewa Beli 1967, oleh kerana defendan telah gagal/enggan untuk menjelaskan pembayaran tersebut maka:

(a) Pada 25 Mac 2000, melalui surat berdaftar AR yang dihantar ke alamat defendan terakhir yang diketahui oleh plaintif iaitu di No 402, Lorong Semantan 25 Taman Sri Semantan, 28000 Temerloh, Pahang Darul Makmur, plaintif telah menyerahkan kepada defendan satu notis niat untuk memiliki semula kenderaan tersebut dalam Jadual Keempat Akta Sewa Beli 1967; dan

(b) Pada 8 April 2000, melalui surat berdaftar AR yang dihantar ke alamat defendan terakhir yang diketahui oleh plaintif iaitu No 402, Lorong Semantan 25 Taman Sri Semantan, 28000 Temerloh, Pahang Darul Makmur, plaintif telah menyerahkan kepada defendan satu notis di bawah peraturan 3, Peraturan-Peraturan

Sewa Beli 1976 menyatakan bahawa plaintif berniat untuk memiliki semula kenderaan tersebut.

9 Selepas itu, plaintif telah membuat 39 percubaan untuk mengesan dan memiliki semula kenderaan tersebut tetapi gagal kerana kenderaan tersebut tidak dapat dikesan dan tidak disimpan di tempat ia harus disimpan menurut perjanjian tersebut.

10 Defendan berhutang kepada plaintif gantirugi tertentu yang telah dipersetujui berjumlah RM22,676.07 dikira sehingga 15 April 2000 dan ianya adalah seperti berikut:

Butir-butir di bawah A 46 k 3
Kaedah-Kaedah Mahkamah Rendah 1980

Tarikh Perjanjian Sewa Beli	:	9 Ogos 1997
Pemilik	:	Arab Malaysian Finance Berhad
Penyewa	:	HASLIZA BTE HASAN
Barang yang disewa	:	PROTON SAGA 1.3S
Harga Sewa Beli		RM 53,490.00
TOLAK		
Bayaran Pendahuluan		RM 9,700.00
Bayaran ansuran dijelaskan		RM 17,052.00
Tunggakan ansuran		RM 2,436.00
Rebet berkanun		RM 4,389.00
		RM 19,912.27
TAMBAH		
Tunggakan ansuran		RM 2,436.00
Lain-lain kos		RM 39.00
		RM 22,387.27
Faedah lewat sebanyak 8% ke atas Tunggakan ansuran dikira setakat 15 April 2000		RM 288.80
JUMLAH:		RM 22,676.07

11 Oleh kerana itu plaintif memohon penghakiman terhadap defendan secara bersesama dan berasingan daripada mahkamah yang mulia ini seperti berikut:

(a) jumlah sebanyak RM22,676.07 dikira setakat 15 April 2000;

(b) faedah pada kadar 8% setahun (berdasarkan kiraan harian) dari 16 April 2000 di atas jumlah RM22,387.27 sehingga penyelesaian keseluruhannya;

(c) kos; dan

(d) apa-apa pelepasan atau remedi yang difikirkan munasabah oleh mahkamah yang mulia.

From the statement of claim and records of proceedings, it appears that the defendant had failed to respond to all relevant notices issued by the plaintiff as required under the Act and had also failed to attend court on the return date of the summons as well as the hearing of appeal in this court (eventhough sufficient notice was given to her by the court registry).

The learned magistrate's ground of decision

It is pertinent for me at this stage to refer the grounds of decision of the learned magistrate in dismissing the plaintiff's claim. His grounds are as follows:

> 1 Mahkamah berpendirian perjanjian sewabeli secara dasarnya berbeza dengan perjanjian pembiayaan kewangan yang lain. Di dalam perjanjian sewabeli, barang masih lagi di dalam milikan pemberi pinjaman walaupun kawalannya berada pada peminjam (penyewa). Jadi sekiranya berlaku sebarang kemungkinan bagi pihak penyewa, pemberi pinjaman sepatutnya mengambil semula kawalan barang-barang berkenaan.
>
> 2 Seksyen 20 Akta Sewa Beli 1967 dan s 18 Akta yang sama tidak terpakai di dalam kes ini kerana di dalam kedua-dua seksyen yang tersebut barang-barang mestilah diambil semula milikan.
>
> 3 Tiada langsung peruntukan di dalam Akta Sewa Beli 1967 yang membolehkan pihak syarkat kewangan menuntut kesemua wang pembiayaan tanpa menarik balik kenderaan yang terbabit. Syarikat kewangan sepatutnya menarik semula barang-barang dan menjualnya semula dengan harga terbaik. Hanya baki tertunggak selepas ditolak harga jualan terbaik boleh dituntut.
>
> 4 Sekiranya plaintif ada menyerahkan notis tentang niat untuk mengambil semula hakmilik melalui Jadual Keempat kepada defendan maka s 42 Akta Sewa Beli 1967 terpakai jika defendan enggan atau gagal mematuhi notis tersebut. Kegagalan defendan mematuhinya boleh menyebabkan beliau dihukum mengikut s 46 Akta Sewa Beli 1967.
>
> Atas alasan-alasan di atas, saya tidak membenarkan penghakiman ingkar kehadiran dimasukkan terhadap defendan pada 29 August 2000 yang lalu dan membatalkan saman pihak plaintif. Ini juga selaras dengan keputusan kes Mahkamah Tinggi Temerloh — *Arab Malaysian Finance Bhd v Suhaimi bin AW Mohamed* Civil Appeal No 11–89–99 yang diputuskan oleh Mohd Hishamudin H pada 14 Mac 2000.

Apparently, the learned magistrate was following the decision of the High Court in the case of *Arab Malaysian Finance Bhd v Suhaimi bin AW Mohamed* [2001] 1 MLJ 149, which was decided on 14 March 2000. In that case, Mohd Hishamudin J held at pp 155–156 that:

> In my judgment, in a civil action for recovery of money arising out of a hire purchase agreement, in the light of the provisions of ss 16 and 43 (or 43A as the case may be) of the Act and reg 3 of the Regulations, the plaintiff, in his statement of claim, apart from showing that there has been compliance with O 46 of the SCR, must also state particulars showing cleary that there has been compliance with such provisions of the Act and Regulations. The requisite particulars are, inter alia, regarding the following:
>
> (a) whether the Fourth Schedule notice had been served on the hirer, including the date and mode of service;
>
> (b) whether the reg 3 notice had been served on the hirer, including the date and mode of service;
>
> (c) whether the vehicle in question had been repossessed, including the date of repossession; and

(d) whether the Fifth Schedule notice had been served on the hirer and guarantor, including the date and mode of service.

Basically, I agree with Mohd Hishamudin J as to all the required particulars that need to be included in the plaintiff's statement of claim for recovery of monies arising out of a hire purchase agreement as listed above. However, my understanding as to particular (c) above is that the plaintiff must state whether the vehicle in question had been repossessed or not. Ultimately, this issue is important to determine the amount to be allowed under the claim. If it had been repossessed, it must be so stated including the date of the repossession. If it has not been repossessed for whatever reason, it must also be so stated, of course without the date of repossession. In other words, whether the vehicle was actually repossessed or not, the fact must be so stated in the statement of claim. Particular (c) above does not in anyway mean that the vehicle must first be repossessed before filing of the action by the plaintiff. It does not indicate that repossession of the vehicle in question is a *sine quo non* for an action to be filed by the owner to recover moneys due under a hire purchase agreement.

As to particular (d), my understanding is that it needs to be stated in the statement of claim if, and only if, the vehicle in question had actually been repossessed. It does not arise in cases where the vehicle had not been repossessed. Particular (d) above talks about 'the 5th Sch Notice'. It is required to be served on hirer and every guarantor of the hirer under s 16(3) of the Act, 21 days after the owner has taken repossession of the goods that were comprised in the hire purchase agreement. In other words, if the owner has not taken repossession of the vehicle for whatever reason, it goes without saying that the statement of claim need not state particular (d). On the other hand, if the owner has repossessed the vehicle in question, then particular (d) must be stated and included in the statement of claim.

Reading the whole judgement in *Suhaimi's* case, it is clear that the learned judge found that the summonses were rightly struck out, as the statement of claim did not contain statements relating to particular (c), ie whether the vehicle in question had been repossessed or not, including the date of repossession. To my understanding, the issue of actual repossession of the vehicle, although discussed at length in the decision was not the judge's reason for upholding the striking out of the summonses. In the premises, the judge's observation on repossession is merely obiter in that case.

In our present case, all the relevant particulars as laid down in *Suhaimi's* case have been fulfilled and sufficiently pleaded in the statement of claim. As to particular (a), para 8(a) of the statement of claim had pleaded that on 25 March 2000, by AR registered post sent to the defendant's last known address, the plaintiff had served the notice of intention to repossess the vehicle in the form as per the 4th Sch ('the 4th Sch Notice'). The said service was done in accordance with s 43 (particularly sub-s (c)) of the Act which states:

> Any notice or document required or authorized to be served on or given or sent to an owner or hirer under this Act may be served or sent —

(a) by delivering it to him personally; or

(b) (repealed by Act A813);

(c) by posting it by registered post addressed to him at his last known place of abode or business.

As to particular (b), para 8(b) of the statement of claim had pleaded that the plaintiff had on 8 April 2000 by AR registered post sent to the defendant's last known address, served on the defendant the notice under reg 3 of the Hire Purchase (Recovery of Possession and Maintenance of Records by Owner) Regulations 1976 ('the reg 3 Notice').

As to particular (c), para 9 of the statement of claim stated that in spite of 39 attempts made by the plaintiff, the vehicle in question could not be repossessed as it could not be tracked down as it was not kept at the address it ought to have been kept under the terms of the hire purchase agreement. Paragraph 9 clearly indicates that the vehicle could not be repossessed. In other words, the vehicle had not been repossessed for reasons stated therein. This is sufficient for the purpose of pleading for particular (c).

Particular (d), regarding 'the 5th Sch Notice' only applies after the vehicle had been repossessed under s 16(3) of the Act. It is a notice to be served on the hirer within 21 days after the vehicle has been repossessed. As the vehicle has not been repossessed in this case, therefore the 5th Sch Notice is non-applicable. There is no necessity for the plaintiff to state particular (d) in his statement of claim, as particular (c) as stated under para 9, had clearly indicated that the vehicle had not been repossessed.

Is repossession of the hired good a sine quo non for an action to be filed by the plaintiff?

From the learned magistrate's grounds of decision, it is apparent that he had held that a hire purchase owner must repossess the hired goods first before he can sue to recover moneys due under a hire purchase agreement. That seems to be the only ground for striking out the summons.

In *Suhaimi's* case the issue on repossession seems to be only obiter. The following statements by the judge in that case seems to indicate this finding. At p 157 (para C–D) it was said:

> a plaintiff must for the purpose of his civil claim to recover money under a hire purchase agreement take steps to repossess the vehicle first in so far as repossession is practically possible.

What if for some plausible reason repossession of the vehicle is not possible? What should an owner do if repossession is genuinely not possible?

To answer those questions, the judge in *Suhaimi's* case clarified that:

> All that I can say with some measure of confidence is that, in such a situation, it must surely be the law that the owner still can pursue his claim against the errant hirer.

From those statements, my understanding is that an owner can still sue the hirer for money due under the hire purchase agreement, if repossession is

not practically possible. It is totally different and misconceived to say, as the learned magistrate had held in his grounds of decision, that the owner cannot sue the hirer unless he had taken possession of the vehicle first.

Section 16 of the Act, deals with repossession of hired goods. Subsection (1) of s 16 of the Act reads:

> Subject to this section, an owner shall not exercise any power of taking possession of goods comprised in a hire purchase agreement arising out of any breach of the agreement relating to the payment of instalments unless there had been two successive default of payments or a default in respect of the last payment and he has served on the hirer a notice, in writing, in the form set out in the Fourth Schedule and the period fixed by the notice has expired, which shall not be less than twenty-one days after the service of the notice.

It is clear that s 16(1) of the Act does not mandate that if there is a default of two successive payments, the owner must repossess the goods. Section 16(1) of the Act is worded in the negative, ie the owner may not repossess the goods unless conditions thereunder have been fulfilled. Put it another way, s 16(1) of the Act states that upon two successive defaults in payment, the owner may repossess the goods (subject to all the other conditions thereunder). It is not mandatory or compulsive for the owner to take possession of the goods in such a situation.

In fact s 20 of the Act, makes it very clear that the owner may sue for money due under the hire purchase agreement and if upon obtaining a judgment thereon, the court may vary that jugment if the goods were subsequently repossessed and sold. Section 20 of the Act states:

> In any legal proceedings in relation to a hire purchase agreement, after the owner has taken possession of the goods, the court before which the proceedings are brought may vary or discharge any judgment or order of any court against the hirer for the recovery of money so far as necessary to give effect to s 18.

(Section 18 of the Act deals mainly with the computation of what amounts are chargeable and what are not to the hirer when the hired good is repossessed). Even the learned judge in *Suhaimi*'s case conceded in his grounds of judgment that 's 20 presupposes an existing judgment or order against the hirer for the recovery of money due under a hire purchase agreement, which a court pursuant to a legal proceeding under this section may discharge or vary in order to give effect to the rights of the hirer under s 18'. This must then necessarily mean further that an owner may initiate an action to sue (and even obtain judgment) before the hired goods have been repossessed.

In *Butterworth Used Cars Sdn Bhd v Mayban Finance* [1991] 3 CLJ 1721, Abdul Hamid Mohamed JC held that the right to sue to recover money due under a hire purchase agreement is concurrent with the right to repossess the hired goods. In dealing with ss 18(2) and 20 of the Act, the learned JC held at p 1724:

> Kepada saya, peruntukan-peruntukan ini memang menjangka kedua-dua tindakan diambil bersama oleh pemunya (owner). Sebab itu ia mengatakan

> bahawa pemilik tidak boleh memperolehi lebih daripada amaun yang kena dibayar oleh penyewa mengikut perjanjian, dan sebab itu jugalah mahkamah mempunyai kuasa untuk meminda penghakiman untuk tujuan itu.

In that case, even though the only issue before the court was indeed on the ownership of the hired goods, the court there had to first determine whether the right to sue for the hire purchase debt and the right to repossess the goods were concurrent remedies as this will determine the owner still owned the vehicle after it had filed a civil suit against the hirer. The learned JC held that the said rights were concurrent.

The clearest statement on this same issue was enunciated in the case of *Ooi Yoke In & Anor v Public Finance Bhd* [1993] 2 CLJ 464, where the High Court held at p 470 that:

> Furthermore, there is no statutory duty under the Act (hire purchase) for the owner to repossess the BMW car before the owner files an action against the hirer.

In an unreported decision of KC Vohrah J in Kuala Lumpur Civil Appeal No R1–11–142–98, the appeal before the court was on one issue only, ie whether an owner must repossess the hired good before he files an action against the hirer. The learned judge ruled in the negative and accordingly dismissed the appeal.

On the above authorities and the relevant provisions of the Act, I am of the view that repossession of the hired goods is not a *sine quo non* for an action to be filed by the owner to recover money due under a hire purchase agreement, against the hirer.

Public policy

I am also of the opinion that it would be contrary to public policy if a defendant in a hire purchase action could come before a court of law to plead a defence that notwithstanding that he had not paid his hire purchase instalments and notwithstanding that he had not returned the hired goods to the plaintiff (owner) although being served with a notice of termination of the hire purchase agreement and/or a 4th Sch Notice (for repossession) under the Act, he could not be sued as the plaintiff had not succeeded in repossessing the hired goods. This finding could lead to abuse by the hirer and may adversely affect the viability of the hire purchase industry. At present, many finance companies have already been frustrated by hirers who illegally sell the hired goods to third parties in contravention of s 38 of the Act (which makes it an offence to sell hired goods), and thereby make it impossible for the goods to be repossessed as the identities and whereabouts of the third parties and thus the hired goods become unknown.

Sections 15 and 16A of the Act provides for the hirer to surrender the hired goods to the owner and by doing so the Act exempts the hirer from having to pay any costs of and incidental to repossession of the goods. Hirer who no longer could afford to keep the hired goods should be expected to resort to these two provisions. The law cannot be interpreted in such a way that it could be abused by the hirer at the expense of the owner, unless there

A are express provisions to that effect in the Act itself. The Act is not only meant to protect the interest of the hirer, but also the interest of the owner. Proper balance must be drawn between them. Only then can the hire purchase industry prosper for the sake of all parties concerned.

B *Section 42 of the Hire Purchase Act 1967*

The learned magistrate also stated in his grounds of decision that in the event that the owner having served the requisite notices of intention to repossess the hired goods on the hirer, is unable to repossess them, then the owner has recourse to s 42 of the Act, which says:

C > Upon complaint made to a court of a magistrate by an owner who is entitled to take possession of any goods comprised in a hire purchase agreement or by any person acting on behalf of an owner that the hirer or any person in possession of the goods has refused or failed to deliver up possession of the goods on the service of a notice of demand made by the owner or by an agent of the owner authorized in that behalf, the magistrate may summon the person
D > complained of to appear before the court and if appears to the court hearing the case that the goods are being detained without just cause, the court may order the goods to be delivered up to the owner at or before a time, and at a place, to be specified in the order.

However, the learned magistrate did not go further to say that he had held that where an owner fails to repossess the hired goods, then he has to resort
E firstly to s 42 before he can commence an action against the hirer to recover a hire purchase debt. It is thus unclear what significance, if any, s 42 has on the issue decided.

A closer look at s 42 will show that the court will only order the goods to be delivered up to the owner if it appears to the court that the goods are
F being detained without just cause. This means that it must first be proven to the court that the hirer or 'any person' is in possession of the goods. If the goods are not or no longer in the possession of the hirer or 'any person' then s 42 will not bite. Therefore, if the hirer had sold the goods to a third party albeit illegally and in contravention of s 38 of the Act, he will still not be subject to an order under s 42 as he is no longer in possession of the goods.
G And if the third party had since sold the goods to an unknown fourth party, the problem can be further compounded many times over. Therefore, it cannot be the law that a prior recourse to s 42 is mandatory before an owner (who has failed to repossess the goods) can sue to recover a hire purchase debt.

H Section 42 is designed for a situation where the owner has found the hirer in possession of the goods but due to some physical obstruction, is unable to repossess the goods. In such situation, the court, when moved under s 42, may order the hirer to deliver up the goods under the threat of sanctions. This, however, has nothing to do with the owner's right to sue for the hire purchase debt. Every finance company would like to repossess the
I hired goods from a defaulting hirer if they can. After all, the goods represent money and are much better than any paper judgment that it may get from the court in a civil suit. It is thus inconceivable that an owner would not

repossess the goods if they can find them, save in situations where the goods cannot be reached without committing a trespass (example where the goods are being locked up behind the hirer's gate) or where the 'repossessor' is faced with a highly menacing hirer with a parang in his hand or some similar situations.

Conclusion

On the law and on the authorities cited above, I am of the opinion that repossession of the hired vehicle is not a *sine quo non* for the plaintiff (owner) to file his suit against the defendant in the lower court to recover moneys due under the hire purchase agreement. The plaintiff had also clearly pleaded that the plaintiff had attempted to repossess the hired vehicle but the vehicle could not be found as it has not been in the address agreed to in the hire purchase agreement and as such repossession was genuinely not possible. Section 42 of the Act is not applicable to the plaintiff as the plaintiff had no information that the said hired vehicle was still 'in the possession of the hirer' or any other identified person.

In those premises, I allow this appeal and make the following order:

(i) that the decision of the learned magistrate dated 29 August 2000 be sets aside; and

(ii) that a judgment in default of appearance with the usual lower court costs and interest be entered against the defendant/respondent (since the appellant is not seeking costs of this appeal against the respondent, I am not making any such order).

Appeal allowed.

Reported by Jafisah Jaafar